DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS
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RODGERS BROTHERS CUSTODIAL SERVICES, INC., Appellant, v. DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS, Appellee	No.: BA-A-04-20040

FINAL ORDER

Appellant Rodgers Brothers Custodial Services, Inc. ("Rodgers"), appeals from a January 29, 2004, Final Order of the District of Columbia Department of Consumer and Regulatory Affairs (the "Decision"). The Administrative Law Judge ("ALJ") found that Appellant violated Title 21, Section 733.1(h) of the District of Columbia Municipal Regulations ("DCMR"), by failing to remove solid waste at its facility by the conclusion of Appellant's approved hours of operations or to store the waste in appropriate containers. The ALJ directed Appellant to pay a $5,000 fine. On review of the record and the briefs submitted by Appellant, I find that there is substantial evidence on the record to support the ALJ's findings. Accordingly, the Decision below is affirmed.

I. Background

The proceedings below arose out of a June 20, 2003, notice of infraction ("NOI") issued by Curt Dedrick, an inspector for the Department of Consumer and Regulatory Affairs

("DCRA"), prepared after Mr. Dedrick observed the perimeter of Rodgers's waste handling facility at 2225 Lawrence Avenue, N.E. The NOI, No. 050580, charged Rodgers with (1) violating 21 DCMR 733.1(d) by failing to secure the facility from unauthorized entry when attendants were not present and (2) violating 21 DCMR 733.1(h) by failing to remove or properly store all solid waste on the premises by the conclusion of the facility's approved hours of operations. R. 4.[1]

Rodgers appealed the NOI and sought a hearing. The case was heard on October 21, 2003, before DCRA ALJ Henry W. McCoy. Both parties appeared at the hearing represented by counsel.

II. The Hearing

The sole witness for the Government at the hearing was Inspector Dedrick. He testified that he inspected Rodgers's facility at approximately 4:30 p.m. on June 20, 2003. Tr. 23.[2] He observed the facility from outside a gate at the intersection of Edwin and Lawrence Streets, Tr. 25, and took eight photographs that were admitted into evidence, Tr. 45. The gate to the facility was open. Tr. 25-26. Inside the facility he saw a pile of solid waste "at least eight to nine feet high" and "running as far as twenty yards or more." Tr. 32. He observed no attendants at the site. Tr. 26.

One of the photographs Mr. Dedrick took showed a sign posted at the facility. The sign stated that Rodgers's "Business Hours" were "Mon. – Fri. 6:30 a.m. – 4:00 p.m." R. 25

[1] Refers to pages in documents in the certified record before the Department of Consumer and Regulatory Affairs below.

[2] Refers to pages of the Transcript of the October 21, 2003 hearing.

(Petitioner's Exhibit ("PX") 8). Mr. Dedrick concluded that the hours posted on the sign were the facility's "hours of operation."[3]

Appellant's president, George Rodgers, testified in opposition to the Government's case. He asserted that the hours posted on the sign were not the facility's operating hours, but rather the hours that it was open to the public. Tr. 49. Mr. Rodgers stated that his company's operating hours were 6:00 a.m. to 7:00 p.m. Tr. 49. He testified that one of the facility's gates was closed at 4:00 p.m., but the main gate would remain open until 7:00 p.m. when it would be closed by the last attendant. Tr. 50. Following the hearing, Appellant's counsel submitted a time record showing that one employee, Reginald Taylor, worked until 5:41 p.m. on June 20, 2003. R. 26. (Respondent's Exhibit ("RX") 1).

III. The Decision

The Decision dismissed the charge that the facility was not secured when attendants were not present, 21 DCMR 733(d), because the ALJ found, as fact, that employee Reginald Taylor signed out at 5:41 p.m. R. 36 (Decision at 5). The ALJ concluded that "it was logical to assume he was on the premises until that time," and, therefore, the Government failed to prove that there were no attendants present at the time the gate was observed unsecured. R. 35 (Decision at 6).

The ALJ was less receptive to Rodgers's contention that its "approved hours of operation" extended until at least 7:00 p.m. The ALJ noted that Rodgers did not have any "approved" hours of operation because the DCRA had not granted the company's pending

[3] The photograph of the sign was taken the day before the hearing. Tr. 44. Mr. Dedrick was not sure that the sign in the photograph was the same sign that he observed on June 20, 2003, but he was certain that the same hours were posted on the sign that he observed on June 20. Tr. 43.

application for a solid waste facility permit.[4] But the ALJ rejected Rodgers's argument that he was required to credit the testimony of the company president on that point or that the operating hours should be deemed as a matter of law to conform to the 7:00 p.m. or 10:00 p.m. limitations required of solid waste facilities under 21 DCMR 732.1(d).[5] Instead, the ALJ determined that the hours posted on the company's sign were controlling:

> Given the requirement that the facility post its hours of operation and this is the only sign on the facility with hours of operation listed, the Court is compelled to accept the Petitioner's position that these are the hours of operation for the business and it is by 4:00 p.m. that all solid waste should have been removed from the facility or placed into leak-proof containers. The Respondent's submission of the employee's time card is only evidence that the employee worked beyond 4:00 p.m., not that it closed at 7:00 p.m.

Decision at 7, R. 34 (footnotes omitted).

Accordingly, the Decision concluded that Rodgers had "failed to removed all solid waste by the end of the facility's approved operating hours as required by 21 DCMR § 733.1(h)." Appellant was ordered to pay a fine of $5,000 for this infraction. R. 33 (Decision at 8).

[4] Although Rodgers's application for a permit had not been approved, the Government did not contest the company's right to operate the facility while its application was pending.

[5] 21 DCMR 732.1(d)(1) provides that: "Solid waste facilities located within three hundred feet (300 ft.) of a residential property line shall be precluded from operating between the hours of 7:00 p.m. and 6:00 a.m. Monday through Saturday." 21 DCMR 732.1(d)(2) provides that: "Solid waste facilities located more than three hundred feet (300 ft.) of a residential property line shall be precluded from operating between the hours of 10:00 p.m. and 6:00 a.m. Monday through Saturday." The record does not reflect whether the Rodgers facility was within 300 feet of a residential property line.

IV. The Appeal

On February 18, 2004, Appellant appealed the Decision to the Board of Appeals and Review, whose jurisdiction to hear appeals was transferred to the Office of Administrative Hearings. D.C. Official Code § 2-1831.03(a)(3). In December, 2005, this agency issued an appeal scheduling order, followed by a briefing schedule on April 13, 2006. Appellant filed its brief on May 1, 2006. It filed a short supplemental brief on April 17, 2007. The Government elected not to file a response to either the brief or the supplemental brief. In the absence of any participation by the Government, I have determined that oral argument is unnecessary.

Appellant contends in its brief that the ALJ's findings and conclusions are not supported by substantial evidence for four reasons: (1) the District of Columbia Municipal Regulations, 21 DCMR 732.1, permit solid waste facilities to operate until at least 7:00 p.m., Appellant's Br. at 7; (2) the ALJ erred by ignoring George Rodgers's testimony that the closing hours were 7:00 p.m. in the absence of any evidence concerning operations at the facility after the inspector observed it at 4:30 p.m., Appellant's Br. at 8; (3) the ALJ erred in crediting evidence that an employee remained at the facility until 5:41 p.m. as grounds for holding that the Government had not proven that the facility was unattended, while failing to consider the employee's presence as evidence that the facility's operating hours extended past 4:00 p.m., Appellant's Br. at 9; (4) the ALJ erred by equating the "business hours" posted on the sign with "operating hours," in the face of Mr. Rodgers's testimony that the two were not the same, and the additional evidence that an employee continued to work at the facility past the posted business hours, Appellant's Br. at 9-11. In its supplemental brief Appellant's counsel moves to: (1) consolidate this appeal with eight other cases arising out of NOIs against Rodgers that are now pending before the Office of Administrative Hearings, Appellant's Supp. Br. at 2; (2) dismiss this appeal because the

transcript of the October 21, 2003, hearing is an incomplete record; and (3) consider constitutional issues not addressed by the ALJ, including whether the underlying regulations are "reasonably related to any public purpose," Appellant's Supp. Br. at 3.

V. The Standard of Review

The standard of review in this case is prescribed by OAH Rule 2908.2, 1 DCMR 2908.2. The Decision must be affirmed unless: (a) it was "issued without observance of the procedures required by law;" (b) it is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the Constitution or applicable law;" or (c) it is "not supported by substantial evidence in the record as a whole."

Findings of fact, whether based on oral or documentary evidence, must not be set aside unless clearly erroneous. *In re Godette,* 919 A.2d 1157, 1165 (D.C. 2007). This administrative court must accept a finding that is supported by substantial evidence in the record as a whole, "even though there may also be substantial evidence in the record to support a contrary finding." *Id.* at 1163 (quoting *Baumgartner v. Police & Firemen's Ret. & Relief Bd.*, 527 A.2d 313, 316 (D.C. 1987)). Moreover, because this administrative court acts as an appellate body in these circumstances, we must defer to the ALJ's factual findings and view the record in the light most favorable to those findings. *Id.* at 1164 (citing *Peay v. United States*, 597 A.2d 1318, 1320 (D.C. 1991) (en banc)). In an appeal, "credibility determinations of a[n administrative law judge] are accorded special deference. . . ." *Gross v. D.C. Dep't of Employment Svcs.*, 826 A.2d 393, 395 (D.C. 2003) (*quoting Teal v. D.C. Dep't of Employment Svcs.*, 580 A.2d 647, 651, n.7 (D.C. 1990)). In addition,

VI. Analysis

Appellant does not urge here that the ALJ's Decision was issued without observance of the procedure required by law. Appellant's key arguments are that the Decision is not in accordance with applicable law because the ALJ misinterpreted the governing regulations, and that the ALJ's determination is not supported by substantial evidence on the record as a whole. Because I conclude that the ALJ did not misconstrue the governing regulations and that the record contains substantial evidence to support the ALJ's findings and conclusions, I reject Appellant's arguments.

The starting point for any assessment of the ALJ's Decision is the regulation that Appellant is alleged to have violated, 21 DCMR 733.1(h). The regulation requires:

> All solid waste shall either be removed from the facility by the conclusion of the facility's approved hours of operations specified on the facility's permit or stored inside the facility in containers or cargo areas of vehicles; Provided, that the containers and cargo areas are leak-proof and fully enclosed on all sides by metal;

Appellant does not suggest that the solid waste that the inspector observed was stored in containers or was going to be stored in containers. Thus, the sole issue is whether the evidence supported a finding that the solid waste that the inspector observed was present at the site following the facility's "approved hours of operation."[6]

[6] The ALJ reasonably might have concluded that a pile of solid waste nine feet high and twenty yards or more long could not have been removed from the site in the two and one half hours that remained between the inspector's visit and the closing time asserted by Mr. Rodgers. But the ALJ did not base his Decision on this evidence and, as an appellate body, this agency may not affirm the Decision on grounds other than those adopted by the tribunal below. "An administrative order can only be sustained on the grounds relied on by the agency; we cannot substitute our judgment for that of the agency." *Jones v. D.C. Dep't of Employment Svcs.*, 519 A.2d 704, 703 (D.C. 1987) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943).

An analysis of the record reveals substantial evidence to support the ALJ's determination that Rodgers's hours of operation were those posted on the sign rather than the later hours that the company president asserted: (1) The sign listed the company's "business hours" as 6:30 a.m. to 4:00 p.m., R. 25 (PX. 8), R. 37 (Decision at 5); (2) the only other hours posted on the sign showed a 3:30 p.m. ending time, R. 25 (PX. 8); (3) the sign was required by regulation to display the facility's "hours of operation," 21 DCMR 733.1(c); (4) the time record submitted by Rodgers recorded only a single employee on the premises after 4:00 p.m., R. 26 (RX 1); (5) Inspector Dedrick did not observe any employee at work on the property at 4:30 p.m., Tr. 26; (6) Rodgers's time record showed that the sole employee who was at the premises clocked out at 5:41 p.m., one hour and nineteen minutes before the company's alleged closing time, R. 26 (RX. 1); R. 34, n. 5 (Decision at 7).

In addition to this affirmative evidence that the posted hours were the company's hours of operation, the ALJ was entitled to consider the conspicuous absence of any evidence to show that the company was operating following the tranquil calm the inspector observed at 4:30 p.m. *See In Re Godette,* 919 A.2d at 1165 (party's failure to deny assertion is evidence of its truth). (1) Rodgers presented no evidence that any employee actually worked until 7:00 p.m. on the day of the violation or on any other day. (2) Rodgers presented no evidence that more than one employee was present on the premises after 4:30 p.m. (3) Rodgers presented no evidence of what the employee on the premises was doing or whether it related to the company operations. (4) Rodgers presented no evidence that the huge mass of solid waste observed by the inspector was actually removed by 7:00 p.m. or, indeed, that any of it was removed after the inspector observed it.

In sum, there was ample evidence in the record to support the ALJ's conclusion that the solid waste on Appellant's premises was not removed by the conclusion of the facility's approved hours of operation. The ALJ was under no obligation to credit the self-serving testimony of the company president that the hours of operation extended to 7:00 p.m. The testimony was belied both by the sign and by the employee time records that showed that the single employee on site departed more than an hour before the alleged closing time. In our role as an appellate tribunal, our "duty to defer to the findings of the trier of fact is obviously at its zenith when that trier of fact had the opportunity to hear the testimony and observe the demeanor of the witness." *In re Godette,* 919 A.2d at 1154.

Nor was the ALJ obligated to use the District of Columbia Municipal Regulation that prohibited solid waste facilities from operating during certain hours, 21 DCMR 732.1(d)(1), as a measure of the approved hours of operation for purposes of the regulation at issue here. The "approved hours of operation" referenced in 21 DCMR 733.1(h) are the hours "specified in the facility's permit." The obvious intent of the regulation is to ensure that all solid waste is removed or containerized by the time the company ceases its daily operations. The ALJ did not err in interpreting the regulation here in a manner that was consistent with its purpose.

The remaining issues on appeal are easily disposed of. Rodgers's motion to consolidate this case with other infractions pending before the Office of Administrative Hearings is denied. The issues raised in those infractions are issues of first impression where the OAH judge acts as trier of fact. In this case, the OAH, as successor to the Board of Appeals and Review, acts as an appellate body. Our role is to review a record that has already been made rather than to make a new record. Even if the regulations and the factual questions involved were nearly identical, consolidation would be inappropriate.

Rodgers's contention that the audio tapes do not provide a complete record of the hearing has no support in the transcript record. The transcript records each point at which the audiotape was turned or changed. *See* Tr. 1, 27, 56, 83. The few places where the transcript indicates a blank space in the tape or where a response is undecipherable do not materially affect the overall record.

Finally, Appellant contends that the regulations in question are "not reasonably related to any public purpose and should be stricken under the principles in *Campbell v. District of Columbia*, 19 Appellant. D.C. 131, 137 (1901)." It is debatable whether a century-old case decided in the era of *Lochner*[7] is still good law or whether a regulation governing dead animals is analogous to rules governing the operation of solid waste disposal facilities. But I need not address the issue for two reasons. First, Appellant did not raise the issue below, and therefore it is not appropriate for review on appeal. OAH Rule 2908.4, 1 DCMR 2808.4. Second, an administrative court, such as the Office of Administrative Hearings, has no power to declare a statute or regulation unconstitutional. *Archer v. D.C. Dep't of Human Resources*, 375 A.2d 523, 526 (D.C. 1977).

VII. Conclusion

The evidence in the record below demonstrates that at 4:30 p.m. on June 20, 2003, there was a pile of solid waste nine feet high and twenty feet long at Appellant's solid waste facility. No employee was visible on the premises and there was no visible sign of any activity. A sign, posted in compliance with a regulation that required the facility to display its "hours of operation," stated that the facility's "business hours" ended at 4:00 p.m. The single employee on

[7] *Lochner v. New York*, 198 U.S. 45 (1905).

site, as documented in the company records, clocked out at 5:41 p.m., one hour and nineteen minutes before the closing hour proffered by Appellant.

It is clear that there was substantial evidence on the record as a whole to support the ALJ's determination that Appellant's hours of operation only extended to 4:00 p.m. and that the company had not removed or containerized the solid waste on its premises by that time. The ALJ's conclusion was not clearly erroneous. The Decision and Order below is affirmed.

Accordingly, it is, this **10th** day of **September, 2007,**

ORDERED that the Decision and Order of Administrative Law Judge Henry W. McCoy, issued on January 29, 2004, and served on February 2, 2004, is **AFFIRMED**, and it is further

ORDERED that Appellant's motion to consolidate this appeal with certain other cases pending in the Office of Administrative Hearings is **DENIED**; and it is further

ORDERED that the appeal rights of any party aggrieved by the Final Order are set forth below.

September 10, 2007

/s/_____
Nicholas H. Cobbs
Administrative Law Judge